No. 17-1077

IN THE

Supreme Court of the United States

FRANCIS V. LORENZO,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's U.S. members are responsible for regulating transactions under state securities laws, commonly known as "Blue Sky Laws." *See generally* LOUIS LOSS ET AL., SECURITIES REGULATION 55-251 (6th ed. 2014). Our U.S. members' principal activities include: registering local securities offerings, licensing and examining brokers and investment advisers who sell securities or provide investment advice, and initiating enforcement actions to combat fraud and other violations of state securities laws. One of NASAA's goals is to foster greater uniformity across state and federal securities laws, though the overriding mission of NASAA and its members is to

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[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for *amicus* affirms that no party other than *amicus* and its counsel authored this brief, in whole or in any part, and that no person or entity other than *amicus* or *amicus's* counsel has made a monetary contribution to the preparation and submission of this brief. The parties have provided their written consent for the filing of this *amicus* brief.

protect investors, particularly retail investors, from fraud and abuse.

NASAA supports the work of its members and the investing public by, among other things, promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions and examinations, and commenting on proposed legislation and rulemakings. NASAA also offers its legal analysis and policy perspective to state and federal courts as *amicus curiae* in important cases involving the interpretation of state and federal securities laws, securities regulation, and investor protection. This is one of those cases. NASAA and its members have an interest in this matter because this case has important implications for public and private antifraud actions brought under federal securities law and, potentially, under state securities laws as well.

NASAA is submitting this *amicus curiae* brief to provide its views on this litigation and to rebut arguments made by Petitioner and his two *amici* in briefs filed August 27, 2018, the *Brief of Amici Curiae Securities Law Professors in Support of Petitioner* (hereinafter, the "Professors' Brief") and the *Brief of Amici Curiae Securities Industry and Financial Markets Association and Chamber of Commerce of the United States of America Supporting Petitioner* (hereinafter, the "SIFMA/Chamber Brief").

SUMMARY OF ARGUMENT

Petitioner was found liable for making material misstatements and engaging in a fraudulent scheme in violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder by the U.S. Securities and Exchange Commission (the "SEC" or "Commission"). *See In re Francis V. Lorenzo*, SEC Release No. 34-74836 (Apr. 29, 2015). A majority of the judges on a three-judge panel of the Court of Appeals for the District of Columbia Circuit (the "Circuit Court") found substantial evidence to support nearly all of the Commission's findings. *See Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017). Arguing that the facts and law do not support the Circuit Court's decision, Petitioner seeks to overturn it. Petitioner is wrong.

The Circuit Court properly found Petitioner liable for engaging in a fraudulent scheme within the meaning of Section 10(b) and Rules 10b-5(a) and (c). Petitioner's act of knowingly sending two materially false and misleading emails to effectuate the sale of securities his brokerage firm was underwriting is precisely the sort of fraudulent scheme that Congress intended the securities laws to prevent and punish.

In addition, although not squarely before the Court, the Commission properly found in its underlying administrative court decision that Petitioner was also liable under Rule 10b-5(b) as the "maker" of the misstatements in his two emails pursuant to *Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135 (2011). Finally, given the findings of liability under Rule 10b-5, Petitioner's

liability under Section 17(a) of the Securities Act of 1933 logically follows as well.

In contrast, Petitioner and his *amici* ask this Court to significantly limit the scope of liability under Rules 10b-5(a) and (c). They assert this is necessary to maintain fidelity with the Court's relevant precedents, to achieve consistency between Section 10(b) and Section 17(a), and because the nation's securities markets would be imperiled otherwise. None of these points are valid. The Circuit Court's opinion affirming defendant's culpability under Rules 10b-5(a) and (c) was correct and on all fours with this Court's jurisprudence. This is aptly demonstrated by both the Circuit Court's opinion and other relevant precedent cited below. Furthermore, Petitioner's purported concern that the securities markets are or will be harmed by enforcing the securities laws is baseless. To the contrary; the securities laws, and Rules 10b-5(a) and (c) in particular, were intended first and foremost to protect investors and the securities markets generally from fraud.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE SEC'S FINDING THAT PETITIONER ENGAGED IN AN UNLAWFUL SECURITIES SCHEME.

Section 10(b) makes it unlawful "to use or employ . . . any manipulative or deceptive device or contrivance" in connection with the purchase or sale

of a security. 15 U.S.C. § 78j(b). SEC Rule 10b-5 promulgated thereunder contains three subparagraphs that diagram broad categories of such manipulative or deceptive devices: (a) fraudulent schemes or artifices, (b) fraudulent misrepresentations or omissions, and (c) fraudulent practices or courses of business. 17 C.F.R. § 240.10b-5. The Court has long held that Section 10(b) and Rule 10b-5 "should be construed not technically and restrictively, but flexibly to effectuate [their] remedial purposes" of protecting investors and establishing fair and orderly markets. *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotations and citations omitted).

Rule 10b-5 claims typically fall into two general categories: misrepresentation claims, which proceed under Rule 10b-5(b), and "scheme liability" claims, which proceed under Rule 10b-5(a) or (c). *E.g.*, *In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 643 n.29 (3d Cir. 2011) ("We refer to claims under Rule 10b–5(a) and (c) as 'scheme liability claims' because they make deceptive conduct actionable, as opposed to Rule 10b–5(b), which relates to deceptive statements."), *abrogated on other grounds by Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013). The term "scheme liability" is a relatively recent jurisprudential coinage; the first reported opinion to use this term was in 2005. *See In re Global Crossing Ltd. Sec. Litig.*, No. 02 Civ. 910(GEL), 2005 WL 1907005, *2 n.5 (S.D.N.Y. Aug. 8, 2005). This is not because the concept of "scheme liability" did not previously exist; Rules 10b-5(a) and (c) have prohibited fraudulent securities schemes since the

rule was enacted in 1942. *See* Exchange Act Release No. 3230 (May 21, 1942). The relevant jurisprudential question is, thus, to what extent causes of action pled under Rule 10b-5(a) or (c), such as the case at bar, are valid.

NASAA member state securities regulators combat securities fraud on a daily basis. These securities frauds encompass a dizzying array of bad behavior – including offering frauds, market manipulation schemes, insider trading, Ponzi schemes, theft or conversion, and breach of a fiduciary or other duty by a securities professional –and often involve a mélange of fraudulent misrepresentations and schemes to defraud. For example, a Ponzi schemer typically perpetuates his scam through misrepresentations (*e.g.*, false investor reports) and deceptive schemes (*e.g.*, repaying earlier investors with deposits from later investors). Most securities frauds thus cannot be categorized as solely a misrepresentation or a scheme liability case, but instead include both false representations and schemes to defraud. The instant litigation is just such a case. Petitioner engaged in both a deceptive scheme to defraud and made misleading statements. Since Petitioner violated two separate sections of the securities laws, he should be held accountable under both sections. The text of Rule 10b-5 makes it clear that the subsections of the Rule are complementary and should not be interpreted in a way that works against Congress's purpose in enacting Section 10(b), which was to prohibit securities fraud in any of its myriad forms. *Chiarella v. United States*, 445 U.S.

222, 234-35 (1980) ("Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.").

Petitioner and his *amici* ask this Court to hold that primary liability under Rule 10b-5(a) or (c) can never be predicated solely on a misrepresentation or omission. They argue that frauds predicated on misstatements should always proceed under Rule 10b-5(b) only, and that this Court should create out of thin air an addendum to Rule 10b-5(a) and (c) that limits scheme liability to those schemes that do not rely on misrepresentations. This is necessary and appropriate, they claim, so as not to render meaningless the boundaries on primary liability under Rule 10b-5(b) this Court set forth in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) and *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011). *See* Petitioner's Brief at 17-18; Professors' Brief at 10-11; SIFMA/Chamber Brief at 15-17. Petitioner and his *amici* are mistaken. It is plain from the language of Rule 10b-5 that Primary liability can exist under Rule 10b-5(a) or (c)—indeed, such liability has always existed—for fraudulent schemes predicated upon material misrepresentations or omissions. What is more, this conclusion does no damage to this Court's decisions in *Central Bank*, *Janus* or otherwise.

A. Insider Trading Is Scheme Liability Predicated Upon Misrepresentations or Omissions.

That liability can exist under Rule 10b-5(a) or (c) based purely on a material misrepresentation or omission is illustrated by this Court's precedent regarding insider trading. No statute or SEC rule expressly prohibits insider trading. Rather, insider trading is unlawful under Section 10(b) and Rule 10b-5 because of the inherent unfairness when one party takes advantage of material nonpublic information in violation of a duty of confidentiality owed to another party. *Dirks v. SEC*, 463 U.S. 646, 654 (1983). Under either the so-called classical or misappropriation theories, insider trading "satisfies § 10(b)'s requirement that chargeable conduct involve a 'deceptive device or contrivance' used 'in connection with' the purchase or sale of securities." *United States v. O'Hagan*, 521 U.S. 642, 653 (1997). The deceptive device in insider trading is "feigning fidelity to the source of information." *Id.* at 655. *See also Dirks*, 463 U.S. at 660 (explaining that tippees assume the disclosure duties of their tippers).

Insider trading liability is tied to Rule 10b-5(a) and (c), not Rule 10b-5(b), notwithstanding that insider trading is at root a misrepresentation crime. *See O'Hagan*, 521 U.S. at 651 (citing Rule 10b-5(a) and (c) as the sources of legal liability); *Chiarella*, 445 U.S. at 225-26 (1980) (same). This is consistent with the text of Rules 10b-5(a) and (c), which are written more broadly than paragraph (b). As this Court

explained long ago in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), "the second subparagraph of [Rule 10b-5] specifies the making of an untrue statement of a material fact and the omission to state a material fact. *The first and third subparagraphs are not so restricted.*" *Id.* at 152-53 (emphasis added).

Even in cases in which a defendant affirmatively lies about his intention not to trade or otherwise makes a misstatement that would clearly give rise to a potential Rule 10b-5(b) cause of action, liability for insider trading is still treated as a fraudulent *scheme* for which liability resides in Rule 10b-5(a) or (c). *See, e.g., SEC v. Rocklage*, 470 F.3d 1 (1st Cir. 2006) (affirming denial of the defendant's motion to dismiss insider trading charges under Rule 10b-5(a) and (c) where the tippee had misrepresented her intention not to tip or trade on the material nonpublic information); *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (same). A defendant's nondisclosure of the intention to trade, or his affirmative misstatements with respect thereto, is thus an equally deceptive "device, scheme or artifice" under Rule 10b-5(a) or "act, practice, or course of business" under Rule 10b-5(c).

Insider trading is not the only type of scheme liability predicated upon material misrepresentations or omissions that courts have recognized. Other such schemes include a broker-dealer or investment adviser's selective misallocation of securities trades, colloquially and colorfully known as "cherry-picking" (*e.g., SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275

(S.D. Fla. 2007), falsification of corporate financial records (*e.g.*, *SEC v. Monterosso*, 756 F.3d 1326 (11th Cir. 2014), and arrangement of sham transactions to give a false appearance of business operations (*e.g.*, *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472 (S.D.N.Y. 2005). "Accordingly, scheme liability does not preclude, outright, claims based upon a scheme to misrepresent or omit material facts." *SEC v. Goldstone*, 952 F. Supp. 2d 1060, 1206 (D.N.M. 2013).

B. Liability under Rule 10b-5(a) or (c) is Predicated on Whether the Defendant's Conduct was Deceptive or Manipulative

The plain text of Rules 10b-5(a) or (c) makes clear that a fraudulent scheme claim is predicated not on whether a material misrepresentation or omission occurred, but rather on whether the defendant's conduct was deceptive or manipulative. Indeed, one district court has called it "nonsensical" that scheme liability cannot exist where the purpose of the scheme was to make a misstatement. *SEC v. Lucent Tech.*, 610 F. Supp. 2d 342, 359 (D.N.J. 2009). The existence of a deceptive or manipulative act has always been the *sine qua non* of liability under Rule 10b-5, and this notion is rooted in the actual text of Section 10(b): "It shall be unlawful for any person, directly or indirectly, . . . to use or employ, in connection with the purchase or sale of any security . . ., *any manipulative or deceptive device or contrivance* . . . ." 15 U.S.C. § 78j(b) (emphasis added).

Conduct is *manipulative* within the meaning of Section 10(b) and Rule 10b-5 when it improperly

affects the market for a security. The word manipulative "is virtually a term of art" and "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). Activities such as price rigging, wash sales, matched orders, layering, or spoofing are manipulative because they artificially affect the normal functioning of the securities markets. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977); *SEC v. Lek Sec. Corp.*, 276 F. Supp. 3d 49, 54-56 (S.D.N.Y. 2017).

While the Court has not yet defined *deceptive* conduct for purposes of Section 10(b) and Rule 10b-5 (*Regents of the Univ. of Calif. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 389 (5th Cir. 2007)), it has held that conduct itself can be deceptive – *i.e.*, deception does not require that a misrepresentation or omission has occurred – and that misrepresentations or omissions can themselves constitute deceptive acts. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

Lower courts presented with this question generally pose the following test for deception: Did the defendant's conduct give anyone a false impression of material fact about a security (or could anyone have reasonably gotten such a false impression)? *See, e.g.*, *SEC v. Dorozhko*, 574 F.3d 42, 50 (2d Cir. 2009) ("'deceptive' covers a wide spectrum of conduct involving cheating or trading in falsehoods); *United States v. Finnerty*, 533 F.3d 143, 148 (2d. Cir. 2008)

(deception "entails some act that gives the victim a false impression"); *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1174 n.10 (9th Cir. 2006) ("Something is deceptive if it tends or has the power to 'give a false impression.'"). Deception thus can be satisfied either in actuality (*i.e.*, one or more victims really were deceived) or potentially (*i.e.*, a reasonable person in the victim's position could have been deceived). Applying this same test to determine whether a defendant's conduct was deceptive or manipulative pursuant to Rules 10b-5(a) and (c) as the Circuit Court did here, is not at all unfair or unreasonable, nor does such a test ensure that the SEC or a private plaintiff will prevail. For example, courts in the Second Circuit have taken this approach in government prosecutions and the government has still lost. *See Finnerty*, 533 F.3d at 148-49.

C. Petitioner's Conduct was Deceptive.

As the Circuit Court held, the facts at issue here are sufficient to demonstrate that Petitioner committed a deceptive act and is liable under Rules 10b-5(a) and (c). The Circuit Court found substantial evidence in support of the Commission's conclusions that Petitioner violated Rule 10b-5(a) and (c) when, at the request of his boss, Petitioner sent two emails to potential investors in a debenture offering and included in his emails the following material falsehoods, the untruth of which *was known* to Petitioner: (i) the issuer had over $10 million in confirmed assets; (ii) the issuer had purchase orders and letters of intent for over $43 million in orders; and

(iii) Petitioner's firm had agreed to raise additional monies to repay any purchasers in the future if necessary. *See* 872 F.3d at 581. The Circuit Court agreed with the Commission that Petitioner took an "active role in producing and sending the emails [which] constituted employing a deceptive device, act, or artifice to defraud." *Id.* at 589 (internal citation and quotations omitted).

With respect to the Petitioner's deception, his role as director of investment banking at his brokerage firm was known to the potential investors (or at least fully disclosed to them), and Petitioner also personally vouched for the veracity of the information in his two emails. *Id.* at 590. He was not a ministerial employee, and investors reasonably expected that he had access to sensitive or even privileged information about the offering. The Circuit Court rightly concluded that Petitioner's conduct reasonably caused the investors receiving the emails to have a false impression of material facts about the debenture offering. *Id.* at 583-86.

The Circuit Court also found no incongruity between this result and its separate conclusion that Petitioner was not liable for making the misstatements within the meaning of Rule 10b-5(b), as the Court interpreted that term in *Janus*. The Circuit Court reasoned that, depending on the facts and circumstances of each case, someone in Lorenzo's shoes could be potentially liable on a scheme liability theory, on a misstatement theory, on both theories or on neither theory: "One can readily imagine persons whose ministerial acts in connection with false

statements would fail to qualify either as 'making' the statements or as 'employing' any fraudulent device. Lorenzo, in our view, is not such a person." *Id* at 595. The Circuit Court's scheme liability analysis was entirely correct.[2]

Investors reasonably expect, and the plain text of Rule 10b-5 permits, a potential cause of action against a broker-dealer that sells them a security pursuant to information it knew was materially false (or where the broker-dealer was willfully blind or otherwise reckless with respect thereto). A contrary result, such as advocated for by Petitioner and in the SIFMA/Chamber Brief, would give broker-dealers and other securities professionals a free pass to knowingly sell securities pursuant to materially false and misleading information so long as the broker was not the original creator of the misstatements. This is precisely the sort of *caveat emptor* approach that Congress intended the securities laws to prevent. *See Kokesh v. SEC*, — U.S. —, 137 S. Ct. 1635, 1640 n.1 (2017).

D. The Circuit Court's Opinion Is Consistent with *Central Bank* and *Janus*.

The gravamen of Petitioner and his *amici's* complaints with the Circuit Court's opinion is that it would supposedly render *Central Bank* and *Janus* "meaningless." *See* Petitioner's Brief at 21; Professor's Brief at 3; SIFMA/Chamber Brief at 5.

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[2] As discussed in Part II below, Petitioner was also a "maker" under *Janus*.

But *Central Bank* and *Janus* are not so feeble. The Circuit Court's opinion, together with other decisions such as *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015), more than adequately explain why holding Petitioner liable on a scheme liability theory is completely consistent with *Central Bank*, *Janus* and the Court's other precedents.

Central Bank stands for the proposition that private litigants cannot bring aiding and abetting claims under Section 10(b) and Rule 10b-5. *See id.*, 511 U.S. at 191. After *Central Bank*, private rights of action are valid against primary violators only. But what is the dividing line between primary and secondary liability? *Janus* established this boundary for Rule 10b-5(b) claims: a defendant is primarily liable for making a material misrepresentation or omission in violation of Rule 10b-5(b) if the person had "ultimate authority" over it. *Janus*, 564 U.S. at 142. The Court has not established a similar bright line for primary versus secondary liability under Rule 10b-5(a) or (c), though. Instead, Courts currently evaluate this question on a case-by-case basis based on the plain text of the rule and Section 10(b).

Rule 10b-5(a) makes it unlawful "to *employ* any device, scheme, or artifice to defraud." 17 C.F.R. § 240.10b-5(a) (emphasis added). Rule 10b-5(c) makes it unlawful "to *engage* in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(c) (emphasis added). Like the operative word "make" in Rule 10b-5(b), the operative words in

paragraphs (a) and (c) – "employ" and "engage in" – are not difficult to define. The dictionary defines "employ" in this context as "to put to use or service" and "engage in" as "to involve oneself or become occupied / participate." THE AMERICAN HERITAGE COLLEGE DICTIONARY at 460, 464 (4th ed. 2004).

The Court's diagramming of the word "make" in *Janus* indicates that "employ" or "engage in" are broader terms.[3] This result should not be surprising; *Affiliated Ute* said as much forty years ago. *See id.*, 406 U.S. at 152-53. *Janus* reasoned that "make" is akin to "proclaim" or "state." *Id.*, 564 U.S. at 142. The act of proclaiming or stating something is linear; regardless of how a statement is created, responsibility ultimately rests with some authority.[4] Given this, *Janus* concluded, "the maker of a statement is the person or entity with ultimate authority" over it. *Id.* In contrast, the terms "employ" or "engage in" are not so delimited. Multiple persons of independent agency and identity can readily be said to "employ" or "engage in" some conduct, statement or activity. *Janus's* ultimate authority standard thus does not transfer to assessing primary liability under Rule 10b-5(a) or (c).

The Professors' Brief posits that the dividing line between primary and secondary scheme liability should be inferred from the general law of aiding and

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[3] The term "any" – utilized in both 10b-5(a) and (c), is, of course, as broad as the English language permits.

[4] As discussed in Section II, *supra*, this authority could be shared among more than one person.

abetting. They reason that because aiding and abetting requires "substantial assistance" to the underlying violation, "primary liability must require more." Professors' Brief at 8. This approach does not work as a universal rule in the real world of securities frauds. For example, it is a poor rubric for tipper-tippee insider trading cases. Courts routinely hold tippers and tippees equally liable for insider trading even if one of the party's relative culpability vastly exceeded the other's. *E.g.*, *SEC v. Sabrdaran*, 252 F. Supp. 3d 866, 897 (N.D. Cal. 2017) (noting that downstream tippees remote from the underlying breach of fiduciary duty can be held equally liable). *See also Salman v. United States*, — U.S. —, 137 S. Ct. 420 (2016) (rejecting the notion that a tipper must receive a pecuniary or similarly valuable benefit from a tip).

The reasoning in the Professors' posited approach also breaks down upon further testing. For instance, imagine a master/servant situation in which a controlling party has ultimately responsibility for a securities fraud, but the controlled party does all the dirty work. Are they both primary violators? If not, then which one of them is – the controlling party (by virtue of his authority) or the controlled party (because he took all the material steps to perpetrate the fraud)? Convincing arguments could be made in any direction. Similarly, imagine three defendants who conspire to commit a securities fraud and contribute approximately, but not precisely, equally to the scheme (*e.g.*, the first conducts approximately 50% of the misconduct, the second 30%, and the third

20%). Are all three primary violators? Two of them? Just one? To say that a primary violator must do more than merely "substantially assist" in a securities fraud, in the end, teaches us nothing. Instead of the Professors' flawed calculus, a better approach for assessing primary versus secondary scheme liability would be to follow the plain text of the statute and rule, and determine whether each defendant committed a material manipulative or deceptive act. As discussed above, this is precisely what federal courts have been doing for years – and was the approach taken by the Circuit Court below.

II. THE COMMISSION WAS CORRECT THAT PETITIONER WAS A "MAKER" UNDER *JANUS*.

The Circuit Court concluded Lorenzo was not liable under Rule 10b-5(b) because it found that, under the Court's ruling in *Janus*, Lorenzo was not the "maker" of the emails he sent. Although not squarely before the Court, below we explain why the Circuit Court was wrong, providing another avenue for the Court to sustain the Commission's decision.

Under Rule 10b-5(b), it is unlawful to "make any untrue statement of a material fact . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b). In *Janus*, the Court explained that to "[m]ake" means "to state," not to "create." 564 U.S. at 142-44, 131 S. Ct. 2296. Thus, "[o]ne 'makes' a statement by stating it." *Id.* at 142, 131 S. Ct. 2296. "For purposes of Rule 10b-5, the

maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* The Court explained:

> Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.

Id. at 142-43, 131 S. Ct. 2296.

After this Court's decision in *Janus*, corporate officers who signed documents containing untrue statements attempted to avoid Section 10(b) liability by arguing that their company or board of directors, rather than the officers themselves, had "ultimate authority" over the statements, and thus that the officers did not "make" the statements. *See, e.g., In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 163-64 (S.D.N.Y 2012). But this evasive strategy

was roundly rejected by courts. *See id.* (citing cases); *cf. Glickenhaus & Co. v. Household Intern., Inc.*, 787 F.3d 408, 426-27 (7th Cir. 2015) (granting new trial on whether corporate officer "made" false statements in a press release where, among other things, there was no evidence officer signed press release and his name did not appear in the press release) (citing *Peterson v. Winston & Strawn LLP*, 729 F.3d 750, 752 (7th Cir. 2013) (defendant law firm probably not liable for contents of a circular it helped prepare because it "did not sign the document or warrant the truth of its contents")); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 (9th Cir. 2000) (a corporate official who "signs a SEC filing containing misrepresentations" is "mak[ing] a statement so as to be liable as a primary violator under § 10(b)").

Even those courts post-*Janus* that have adopted the narrowest definition of a "maker" nevertheless maintain that "officers whose signatures appear on misleading statements may be liable as the 'makers' of those statements." *Livingston v Cablevision Sys. Corp.*, 966 F. Supp. 2d 208, 221 (E.D.N.Y. 2013) (finding *Janus* abrogated the group-pleading doctrine); *see also In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 640-41 (S.D.N.Y. 2017) (finding the group-pleading/group-published doctrine no longer viable after *Janus*, and limiting the "maker" of a statement to those who, for example, "signed the company's statement; ratified and approved the company's statement; or where the statement is attributed to the executive" (quoting *In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458,

473 (S.D.N.Y. 2012))). Thus, "*Janus* did not change the longstanding rule that corporate officials are liable for misstatements to which they give their imprimatur." *In re Smith Barney*, 884 F. Supp. 2d at 164. Indeed, prior to the ruling of the court below, it appears that courts unanimously have held that a corporate officer's signature or similar imprimatur on a corporate statement renders him a "maker" of the statement.

Here, substantial evidence supports the Commission's finding that Lorenzo had ultimate authority over the untrue statements in his emails, and was thus a "maker" of them for purposes of Rule 10b-5(b). Lorenzo, who was the director of investment banking at a registered broker-dealer, (1) signed off each email with "Truly, Francis V. Lorenzo," his title "Vice President—Investment Banking," and his direct phone number; (2) sent the emails from his own account; (3) invited recipients to "Please call with any questions"; and (4) testified that he understood that, by sending the emails, he was "putting his own reputation on the line."

This evidence is more than sufficient to show that Lorenzo possessed ultimately authority over the emails. First—and dispositive on its own—Lorenzo signed the emails. Just like a corporate officer who puts her signature on a corporate statement written by others, thus adopting the statement as her own, Lorenzo adopted the emails as his own by signing them with his name and title and sending them from his email address. In dismissing the import of this

evidence, the Circuit Court reasoned only that this "sort of signature line . . . can often exist when one person sends an email that 'publishes a statement on behalf of another,' with the latter person retaining 'ultimate authority over the statement.'" *Lorenzo*, 872 F.3d at 588 (quoting *Janus*, 564 U.S. at 142, 131 S. Ct. 2296). This reasoning is flawed. As an initial matter, there is no evidence in the record upon which the Circuit Court based its observation regarding the nature of Lorenzo's signature line, or what the signature line signified for either Lorenzo or the recipients of his email.[5] To the contrary, had Lorenzo wanted to make it clear he was "publish[ing] a statement on behalf of" his bosses, *Lorenzo*, 872 F.3d at 588, he would have employed the commonly-used "sent on behalf of" function commonly used on Microsoft Outlook and other major email platforms.[6] That instead he affixed his own signature to the email and sent it from his account is dispositive.

The Circuit Court's reasoning is also flawed because it relies on language from *Janus* divorced from its context. In *Janus*, the Court held that, because the defendant was a "legally independent entity," it could not be the "maker" of a statement filed

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[5] Nor did the Circuit Court explain from whose perspective a court should determine the significance of the signature: a reasonable investor, the investor receiving the email, Lorenzo himself, or Gregg Lorenzo.

[6] *See Manage Another Person's Mail and Calendar Items*, Microsoft, https://support.office.com/en-us/article/manage-another-person-s-mail-and-calendar-items-afb79d6b-2967-43b9-a944-a6b953190af5.

with the SEC because it could not legally have the ultimate authority to file the statement with the SEC. 564 U.S. at 146-47, 131 S. Ct. 2296. Here, by contrast, there is no legally independent entity at issue; Lorenzo was a registered broker and director of investment banking at Charles Vista, LLC, with his own independent duties to that company and its investors. He could, and did, make statements that legally bound his company.

The Circuit Court's reasoning also appears to assume that only one individual within an organization can "make" a statement; that is, the Circuit Court assumed that if Gregg Lorenzo had "ultimate authority" over the email statements, Lorenzo cannot also have "ultimate authority" over the email statements. But there is no legal principle that limits Rule 10b-5(b) in such a manner. To the contrary, both SEC enforcement actions and private suits under Rule 10b-5(b) hold accountable multiple senior executives who, for instance, all signed a company's SEC filings containing untrue statements or all participated in an earnings conference call during which untrue statements were made. *See, e.g.*, *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017) (affirming class certification in Section 10(b) action against Barclays and three of its senior executives based on misstatements in, among other things, press releases); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90 (D.C. Cir. 2015) (reversing and remanding dismissal of Section 10(b) claims against company and "three of its officers" for false statements made in the company's fiscal year 2007

Annual Report); *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694 (9th Cir. 2012) (complaint adequately stated Section 10(b) claim against company, its CEO, and its CFO based on misstatements in SEC filing); *SEC v. Infinity Grp. Co.*, 212 F.3d 180 (3d Cir. 2000) (Alito, J.) (in Ponzi scheme case, upholding permanent injunction under Section 10(b) against company and its two principals). It is thus clear that, unlike in *Janus*, which dealt with a separate corporate entity, "*within an organization*, more than one person will have ultimate authority over a statement . . . ." *In re Barrick Gold Sec. Litig.*, No. 13 Civ. 3851(SAS), 2015 WL 3486045, at *2 (S.D.N.Y. June 2, 2015); *see also Banco Bradesco*, 277 F. Supp. 3d at 639 ("[N]othing in *Janus* dictates that only one person may have ultimate authority over a statement."); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) ("It is not inconsistent with *Janus Capital* to presume that multiple people in a single corporation have the joint authority to 'make' an SEC filing, such that a misstatement has more than one 'maker.'")

If allowed to stand, the Circuit Court's implicit holding that only one individual within an organization can have "ultimate authority" would eviscerate Rule 10b-5(b) by allowing culpable individuals to escape liability. Take the following scenario: the CEO of a company orders her CFO to insert new language in the company's SEC filing, believing the language to be true. The CFO, knowing the language to be false, nevertheless inserts the new

language, and the CEO and CFO both sign the document and file it with the SEC. Under the Circuit Court's reasoning, neither of these executives would face liability under Rule 10b-5(b). The CFO could simply aver that she did not have "ultimate authority" over the statements because she acted at the direction of the CEO and copied-and-pasted the language the CEO provided to her, while the CEO could claim she lacked scienter. This illogical outcome underscores that the Circuit Court's interpretation stretches *Janus*'s concept of "ultimate authority" too far.

That Lorenzo's emails stated he was sending them "at the request of" his boss does not change this analysis. In addition to signing and sending the emails from his account, Lorenzo demonstrated his ultimate authority over the emails by reassuring investors that they could call *him* "with any questions" regarding the contents of the email or the nature of the investment. Moreover, because Lorenzo testified that he understood he was "putting his own reputation on the line" by sending the emails, there is strong evidence to support that Lorenzo would "take[] credit—or blame—for what [was] ultimately said," *Janus*, 564 U.S. at 143, 131 S. Ct. 2296.

In sum, just as a corporate executive is a "maker" of an untrue statement in a filing he signs, Lorenzo is a "maker" of the solicitation emails he chose to sign and send from his email account. It is thus appropriate to hold him liable under Rule 10b-5(b).

III. THE SAME ANALYSIS HEREIN APPLIES UNDER SECTION 17(A) OF THE SECURITIES ACT.

For the same reasons the Circuit Court upheld the Commission's scheme liability findings against Petitioner, the Circuit Court also affirmed the Commission's finding of liability under Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1). *See Lorenzo*, 872 F.3d at 586. The Circuit Court was right to do so.

Rule 10b-5 is drafted substantially similarly to Section 17(a), and courts interpret liability under these provisions to be substantially similar. *SEC v. Radius Capital Corp.*, 653 Fed. Appx. 744, 749 (11th Cir. 2016). There is no reason to depart from this general principle here. The primary distinction between liability under Section 10(b) and Rule 10b-5 thereunder and Section 17(a) is that "§ 10(b) and Rule 10b-5 applies to acts committed in connection with a *purchase or sale* of securities while § 17(a) applies to acts in connection with an *offer or sale* of securities." *SEC v. Bauer*, 723 F.3d 758, 768 (7th Cir. 2013) (emphasis in original). This difference is of no moment here. Also of no consequence here are the distinctions in how scienter is treated under Section 10(b) and Section 17(a), and that there is no private right of action under Section 17(a). *See Radius Capital*, 653 Fed. Appx. at 749; *Finkel v. Stratton Corp.*, 962 F.2d 169, 170 (2d Cir. 1992)).

Similarly, for the reasons outlined above in Part II that Petitioner should be held liable under

Rule 10b-5(b) as the "maker" of the misleading emails he sent to prospective investors, it follows that he violated Section 17(a)(2) as well. Indeed, Section 17(a)(2) is even broader than Rule 10b-5(b): 17(a)(2) makes it unlawful to "obtain money or property *by means of*" any material misrepresentation or omission while 10b-5(b) requires the defendant to actually "make" the misstatement. *Compare* 15 U.S.C. § 77q(a)(2) *with* 17 C.F.R. § 240.10b-5(b)(2). Thus, to the extent a trier of fact were to find Petitioner liable under Rule 10b-5(b), corresponding liability logically follows under Section 17(a)(2).[7]

IV. THE SEC IS NOT ACTING IN BAD FAITH

The Professors' Brief criticizes the Commission's interpretation of the law with respect to primary versus secondary liability. The Professors' Brief asserts that the Commission "prefers primary fraud charges" and sees the limitations imposed by *Janus* as "a nuisance to avoid." *See* Professors' Brief at 6, 9. The Professors' Brief accuses the Commission further of seeking to "smudge the line" between primary and secondary liability as drawn by this Court. *See* Professors' Brief at 7. It is unclear whether the professors are accusing the Commission of bad faith in its interpretation of primary versus secondary liability, but their brief certainly suggests

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[7] The extent to which *Janus* even applies to Section 17(a)(2) is not settled. *Compare Big Apple*, 783 F.3d at 797 (holding *Janus* does not apply to claims under Section 17(a)(2)), *with SEC v. Knight*, 694 Fed. Appx. 853, 856 n.1 (2d Cir. 2017) (declining to reach the question). This issue need not be reached here.

as much. To the extent they do hold this view, we vigorously disagree.

The Commission has never, to our knowledge, asserted that it is not bound by *Janus*. If the Commission really were of a mind to pursue every legal theory as aggressively as possible, it could have challenged that *Janus's* holding about the scope of primary liability under Rule 10b-5(b) was inapplicable to its own enforcement actions. After all, *Janus* was a private litigation and the decision pointedly did not speak to its potential applicability to governmental actions. *See Janus*, 564 U.S. at 137 ("This case requires us to determine whether Janus Capital Management . . . can be held liable in a private action under [Rule 10b-5].") At least one SEC staff member after *Janus* publicly questioned whether the decision should apply to the agency's actions, *see* Yin Wilczek, *Extent to Which Janus Applies to SEC Actions Not Clear, Official Says*, 44 Sec. Reg. & L. Rep. (BNA) 462 (Mar. 5, 2012), and reasonable arguments can be made that *Janus* should not bind the SEC. *See* Matthew P. Wynne, Student Note, *Rule 10b-5(b) Enforcement Actions in Light of Janus: Making the Case for Agency Deference*, 81 FORDHAM L. REV. 2111 (2013). Yet the Commission has never contested this point. Rather, the inherent logic within *Janus* and the need for consistency across public and private litigations appears to have caused the Commission to forego this potential fight.

V. SIFMA AND THE CHAMBER'S HYPERBOLIC CLAIMS ARE MERITLESS

SIFMA and the Chamber argue that, if the Circuit Court's decision is sustained, one would become liable under Section 10(b) merely by playing some remote role in the dissemination of a statement. SIFMA/Chamber Brief at 14. They write further:

> Securities industry professionals, in particular, distribute the statements of others to their clients by many different channels and involving varying degrees of directness, including public and private websites, individual and mass emails, and the mailing or physical distribution of prospectuses. *Janus* clarified that they do not accept exposure to Section 10(b) or Rule 10b-5 liability each time they do so.

Id. These concerns are meritless hyperbole.

Securities professionals do not become liable for merely delivering prospectuses or other corporate disclosure documents as required by the securities laws and related rules. Rather, one is liable under Section 10(b) and Rule 10b-5 only for knowingly or recklessly distributing false and misleading information in order to effectuate the sale of a security (particularly a security the broker-dealer is itself underwriting).

Moreover, contrary to SIFMA/Chamber's supposition that an avalanche of meritless private litigation will be filed against security market actors

if the Circuit Court's decision is not reversed (*see id.* at 24-26), both the Private Securities Litigation Reform Act ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1996), and the Securities Litigation Uniform Standards Act ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998), as well as the Court's recent jurisprudence provide significant and ample protection against such suits. It is telling that neither petition nor *Amicus* can point to a single securities case filed against security market actors for distributing prospectuses or other routine acts.

It is essential that adequate remedies exist to protect hardworking investors impacted by fraud. Private securities litigation is a necessary supplement to SEC enforcement actions. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)("[The Court] has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private rights of action under the securities laws are a "necessary supplement to Commission action."). As Commissioner Jackson explained earlier this year:

> "...[T]here are two principal ways we hold corporate managers to account when they hurt investors. First, the government can identify the wrongdoing and bring a case.

> Second, investors themselves can bring a lawsuit against the responsible individuals and companies. Government enforcement is crucial to the functioning of our securities markets . . . At the same time, I'm struck again and again by the sheer audacity of fraudsters and by the devastating amount of money investors lose. Almost daily, I am reminded that [the SEC's] world-class enforcement attorneys cannot do it all alone."[8]

Indeed, the amount of securities fraud is simply too great for the SEC and NASAA's members to police on their own. According to former SEC Chair Mary Jo White, "additional funding [for the SEC] is imperative if we are to continue the agency's progress in fulfilling its responsibilities over our increasingly fast, complex, and growing markets."[9] But Congressional budget authorizations have not kept

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[8] Commissioner Robert J. Jackson Jr., Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration, CECP CEO Investor Forum, February 26, 2018, *available at* https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618. *See also* NYU Pollack Center for Law and Business & Cornerstone Research, SEC Enforcement Activity: Public Companies and Subsidiaries, (November 14, 2017), https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-Public-Companies-and-Subsidiaries-Midyear-FY-2018-Update ("[t]he number of new [SEC] actions [against public-company related defendants] declined 33 percent overall in FY 2017.").

[9] Mary Jo White, Testimony on the Fiscal Year 2017 Budget Request of the U.S. Securities and Exchange Commission (March 22, 2016), *available at* www.sec.gov/news/testimony/testimony-white-sec-fy-2017-budget-request.html.

pace with the SEC's needs.[10] State securities regulators face similar budgetary constraints.

Private securities litigation is also the primary mechanism for compensating harmed investors. While the funds obtained by federal and state regulators can in some cases be returned to identifiable investors, the amounts collected in governmental actions pale in comparison to the awards obtained by private litigants themselves. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1542-43 Tables 2 & 3 (2006). ("private enforcement . . . dwarf[s] public enforcement"). In 2016, roughly sixty cents of every dollar returned to investors in corporate-fraud cases came through private, rather than SEC, settlements.[11]

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[10] *See* Melanie Waddell, SEC Seeks Budget Boost to Restore Staff, ThinkAdvisor (February 12, 2018), available at https://www.thinkadvisor.com/2018/02/12/sec-seeks-budget-boost-to-restore-staff/?slreturn=20180911131549 ("The [SEC's] annual appropriations has remained essentially flat from 2016 to 2018, at $1.6 billion. However, during the same period, securities trading has grown by more than $3 trillion, assets under management by investment advisors has jumped more than $5 trillion, and there's been a 17% growth in ETFs and mutual funds.").

[11] *Compare* Cornerstone Research, Securities Class Action Settlements: 2016 Review and Analysis (2016) (noting that, in 2016, federal courts approved approximately $6 billion in securities class-action settlements); *with* U.S. Securities and Exchange Commission, SEC Announces Enforcement Results for FY 2016, Press Release, (Oct. 11, 2016) (noting that the SEC obtained just over $4 billion in disgorgement and penalties in FY 2016).

Private securities litigation also serves a significant role in maintaining investor confidence by enforcing disclosure standards set forth in the securities laws. As this Court has recognized, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). And, scholars have observed that investor lawsuits are as good, if not better, than the government in targeting certain securities-law violations.[12]

Congress too recognizes the important role played by private securities litigation in deterring fraud and compensating victims: "[t]he SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws." S. Rep. No. 98, 104th Cong. 1st Sess., at 8 (1995). And Congress recognizes the important role such actions play in maintaining investor confidence and ensuring market integrity:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action.

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[12] Stephen Choi & Adam Prichard, SEC Investigations and Securities Class Actions: An Empirical Comparison, 13 J. Emp. Legal Stud. 27 (2016).

> Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.

H.R. CONF. REP. NO. 369, 104th Cong. 1st Sess. (1995), at 31 (Nov. 28, 1995).

Even in light of recent limitations placed on private actions by Congress, the underlying intent of Congress to allow for these remedies remains. Congress recognizes the importance of private actions to the overall functioning of the securities markets. To the extent there may be any concerns about the process for which private securities litigations, these concerns are "more appropriately addressed by Congress," not this Court. *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398, 2413 (2014).

CONCLUSION

For all of the foregoing reasons, we respectfully submit that Petitioner should be held in violation of Securities Exchange Act of 1934 Section 10(b) and Rule 10b-5(a), (b), and (c) promulgated thereunder, as well as Section 17(a)(1), (2) and (3) of the Securities Act of 1933.

Respectfully submitted,

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